

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JULE CROWELL, et al.,

Plaintiffs,

V.

## COWLITZ COUNTY, et al.,

## Defendants

## CONMED. INC..

## Intervener/Third-Party Defendant.

CASE NO. C14-5153 BHS

CONSOLIDATED FOR  
PRETRIAL PURPOSES WITH

C14-5385BHS

C14-5672BHS

ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF FROM DEADLINE AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO STRIKE

This matter comes before the Court on Intervenor /Third-Party Defendant

Conmed, Inc.’s (“Conmed”) motion to exclude the undisclosed opinions of Dr. Richard Cummins (Dkt. 88) and Plaintiffs Julie Crowell, Kele Kuanoni, David Nelson, Lisa Sully and Kimberly Bush’s (“Plaintiffs”) motion for relief from deadline (Dkt. 93). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

## I. PROCEDURAL HISTORY

2 On July 29, 2014, the Court issued a scheduling order setting certain pretrial  
3 deadlines. Dkt. 19. On April 30, 2015, the Court granted the parties' stipulated motion  
4 to extend certain deadlines and extended the expert report deadline to August 27, 2015.  
5 Dkt. 80.

6 On September 1, 2015, Conmed filed a motion to strike the expert reports of Dr.  
7 Cummins. Dkt. 88. On September 14, 2015, Plaintiffs responded. Dkt. 101. On  
8 September 18, 2015, Conmed replied. Dkt. 113.

9 On September 9, 2015, Plaintiffs filed a motion for relief from deadline. Dkt. 93.  
10 On September 16, 2015, Conmed responded. Dkt. 103. On September 18, 2015,  
11 Plaintiffs replied. Dkt. 112.

## II. DISCUSSION

13 The Court's scheduling order may be modified only for good cause. Fed. R. Civ.  
14 P. 16(b)(4). Moreover, if a party fails to meet discovery deadlines, the party is precluded  
15 from using that evidence to support a motion or at trial unless the failure was  
16 "substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

17 In this case, Plaintiffs fail to show good cause, excusable neglect, substantial  
18 justification, or harmlessness. With regard to good cause for an extension, Plaintiffs  
19 assert, without support, that “the complexity of the case, the issues to date with obtaining  
20 discovery, and Dr. Cummins’ travel schedule hampered his ability” to complete his  
21 reports on time. Dkt. 112 at 5. Even if true, none of these reasons justifies Plaintiffs’  
22 failure to request an extension before the expert deadline had passed. In fact, Plaintiffs’

1 motion was filed two weeks after the relevant deadline. “A motion for relief from a  
2 deadline should, whenever possible, be filed sufficiently in advance of the deadline to  
3 allow the court to rule on the motion prior to the deadline.” Local Rules, W.D. Wash.  
4 LCR 7(j). Moreover, if a party requests an extension after the deadline has passed, the  
5 party must show “excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). It is reasonable to  
6 assume that Plaintiffs knew that Dr. Cummins’ reports would not be produced by the  
7 deadline, and they failed to timely seek an extension. Under those circumstances, the  
8 Court is unable to find that good cause exists or excusable neglect to grant any extension.  
9 Therefore, the Court denies Plaintiffs’ motion for relief from deadline.

10 With regard to striking Dr. Cummins’ reports, the parties dispute appropriate  
11 sanctions, if any should be imposed at all, because it is undisputed that Plaintiffs failed to  
12 meet the relevant deadline. Exclusion is the “self-executing” or “automatic” sanction  
13 contemplated under Rule 37(c). *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
14 F.3d 1101, 1106 (9th Cir. 2001) (citing Fed. R. Civ. P. 37 advisory committee’s note  
15 (1993)). However, “[t]wo express exceptions ameliorate the harshness of Rule 37(c)(1):  
16 The information may be introduced if the parties’ failure to disclose the required  
17 information is substantially justified or harmless.” *Id.* First, Plaintiffs’ failure to meet  
18 the deadline was not substantially justified because they had knowledge that they would  
19 likely miss the deadline and failed to appropriately respond to the possible failure. The  
20 Court requires expert reports to be produced well in advance of trial so that the opposing  
21 party has an adequate opportunity to evaluate and respond to the report. Knowingly  
22

1 missing this deadline, regardless of the reasons, is not substantial justification for such a  
2 failure.

3 Second, Conmed has been harmed, to some extent, by Plaintiffs' failure to meet  
4 the deadline. Plaintiffs contend that Dr. Cummins tendered his opinions on the Borelis,  
5 Bush, and Deal decedents as of the time of their response. Dkt. 101. The Court finds  
6 that, although tardy, Conmed has sufficient time to respond and may seek an extension of  
7 rebuttal experts, if necessary. Dr. Cummings, however, may not supplement any of these  
8 reports and may not submit any other report. Therefore, the Court grants Conmed's  
9 motion in part and denies the motion in part.

10 Finally, with regard to fees, Conmed is entitled to its fees for bringing its motion.

11 *See* Fed. R. Civ. P. 37(a)(5)(A).

12 **III. ORDER**

13 Therefore, it is hereby **ORDERED** that Conmed's motion to exclude the  
14 undisclosed opinions of Dr. Richard Cummins (Dkt. 88) is **GRANTED in part** and  
15 **DENIED in part** as stated herein and Plaintiffs' motion for relief from deadline (Dkt.  
16 93) is **DENIED**. Conmed may file a petition for fees no later than November 10, 2015,  
17 and Plaintiffs may respond by November 13, 2015.

18 Dated this 2nd day of November, 2015.

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22 BENJAMIN H. SETTLE  
United States District Judge